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Petitioner.

V.

D K SISTO Warden

Respondent.

C 07-3941 WHA (PR)

**REPLY TO PETITIONER'S
OPPOSITION TO MOTION
TO DISMISS UNTIMELY
PETITION FOR WRIT OF
HABEAS CORPUS**

21 Respondent D.K. Sisto hereby submits this reply brief in response to petitioner's
22 opposition to respondent's motion to dismiss the habeas corpus petition as untimely.

23 According to petitioner's calculations, his petition is timely because he was entitled to
24 tolling of the statute of limitations during the period that his first state habeas petition was filed
25 in the California Supreme Court, between September 29, 2005, and July 19, 2006. Opposition at
26 3. Petitioner does not address the fact that the state court denied the petition with citations to *In*
27 *re Swain*, 34 Cal.2d at 304 (denying petition for untimeliness) and *People v. Duvall*, 9 Cal.4th at
28 474 (denying petition for failure to plead reasonably available facts). The "Swain rule is

1 commonly referred to as the ‘untimeliness’ bar.” *Washington v. Cambra*, 208 F.3d 832, 833 (9th
 2 Cir. 2000). When a state court rejects a state postconviction proceeding as untimely, it is not
 3 “properly filed” within the meaning of the statutory tolling provisions of 28 U.S.C. § 2244(d)(2).
 4 *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). Under *DiGuglielmo*, the statute of limitations
 5 was not tolled during the pendency of the September 29, 2005, petition.

6 Petitioner also contends, without reference to case law or statutory authority, that he is
 7 entitled to gap tolling for the periods between the filing of state habeas petitions during 2007.
 8 He asserts that the gaps should be tolled because “[t]hose days were taken for the mail to go back
 9 and forth and the time petitioner had to wait to go to the law library to get his court papers
 10 copied.” He further requests another 21 days for the period “it took the Inmate Trust Account
 11 Office to process petitioner’s application for In Forma Pauperis.” Opposition at 5.

12 There is no legal basis for petitioner’s claims. A federal habeas petitioner is entitled to
 13 tolling when he is “invoking one complete round of the State’s established appellate review
 14 process” in order to exhaust state court remedies. *Carey v. Saffold*, 536 U.S. 214, 220 (2002).
 15 “The Supreme Court construed statutory tolling in the context of California law to allow ‘one
 16 full round,’ not two full rounds.” *Welch v. Carey*, 350 F.3d 1079, 1083 (9th Cir. 2003) (en
 17 banc).

18 Moreover, petitioner’s claims regarding the Inmate Trust Account Office have no legal
 19 basis. The prison mailbox rule authorizes constructive filing at the moment that a petition is
 20 delivered to prison authorities to be forwarded to the court. Petitioner’s dated his proof of
 21 service on July 24, 2007. That must be considered the date of filing.

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CONCLUSION

Accordingly, respondent respectfully requests that the Court dismiss the untimely petition for writ of habeas corpus with prejudice.

Dated: April 7, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Cross v. Sisto, Warden**

No.: **C 07-3941 WHA (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On April 7, 2008, I served the attached

REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS UNTIMELY PETITION FOR WRIT OF HABEAS CORPUS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

Terrell Cross
T-88155 / 3-230L
Solano State Prison
P.O. Box 4000
Vacaville, CA 95696

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 7, 2008, at San Francisco, California.

M. Argarin

Declarant

/s/ M. Argarin

Signature